



**DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING  
*ENFORCEMENT DIVISION*  
*DIRECTIVE***

**DIRECTIVE  
NUMBER  
234**

**DISTRIBUTION  
DATE  
October 1, 1998**

**1 SUBJECT: NOTIFICATION OF RIGHT-TO-SUE**

**2 PURPOSE:** To set forth the procedures to be used when providing notification of the right to file a civil action to persons who have employment discrimination complaints.

**3 BACKGROUND:** The Fair Employment and Housing Act (FEHA), as amended effective January 1, 1993, provides that if an accusation is not issued within 150 days after the filing of a complaint, or if the Department of Fair Employment and Housing (DFEH) earlier determines that no accusation will issue, the Department will promptly notify, in writing, the person claiming to be aggrieved that the Department will issue, on his/her request, the right-to-sue notice. Within one year of receiving such a notice, an individual may bring a civil action against the respondent. When a right-to-sue notice is not requested, the Department will issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint. These letters are automatic. The Department's policy is to issue this notice prior to the expiration of one year from the complaint's filing date.

The FEHA, at Government Code section 12965, subdivision (b), requires that individuals must exhaust their administrative remedies with DFEH by filing a complaint and obtaining a "right-to-sue notice" from the Department before filing a lawsuit under the FEHA. (This section is applicable to all cases except housing. Right-to-sue notices are issued on Unruh (Civ. Code, § 51), Ralph (Civ. Code, § 51.7), and Civil Code section 54 cases.)

Questions have arisen as to whether the requirement to exhaust administrative remedies has been met when the Department closes a case on the basis of "Elected Court Action" prior to the expiration of 150 days from the filing date. In employment cases, however, it is the Department's position that restricted staff resources make it impossible to complete a full investigation and determine whether to issue an accusation within 150 days.

The California Supreme Court, in Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal.3d 211, 213-214, states that once the complainant has received his/her right-to-sue letter, "only then may that person sue in Superior Court under this part" (meaning the FEHA; see also State Personnel Board v. Fair Employment and Housing Commission (1985) 39 Cal.3d 422, 433, fn. 11). Other cases have held that a complainant need not wait 150 days to receive the right-to-

sue letter, but may request the right-to-sue almost immediately after filing with the Department (Carter v. Smith Food King (9th Cir. 1985) 765 F.2d 916).

#### 4. **PROCEDURES:**

##### A. **Automatic Right-to-Sue Notices:**

There are instances where complainants will be automatically issued a right-to-sue notice. These are:

- 1) When a case is still open 150 days after it is filed, the complainant will be issued a notification advising that he/she may request a right-to-sue letter (DFEH-200-21);
- 2) When a case is still open at the expiration of one year from the filing date, complainants will be automatically issued a right-to-sue letter within 10 days of the expiration date.

##### B. **Immediate Right-to-Sue Requests:**

- 1) Where timeliness for filing is not at issue and an individual wishes to file a complaint with the Department to immediately obtain the right-to-sue notice, that individual can contact the Department's Communication Center to obtain a right-to-sue packet. The Communication Center can be reached by calling 1-800-884-1684.

Right-to-Sue packets can also be obtained in person at any of the Department's District Offices.

- 2) When complaints filed under this process are returned to the District Offices, a designated member of the support staff will be responsible for processing the complaint in accordance with the instructions in the Enforcement Division's Clerical Case Processing Manual, Intake Chapter.
- 3) The complaint will not be dual filed with EEOC.
- 4) It is the Department's policy not to reopen a case once it has been closed on "Complainant Elected Court Action" at intake. However, on rare occasions, a situation will arise where the possibility of reopening a closed case must be evaluated. Requests to reopen cases closed at intake with Closing Category 06, "Complainant Elected Court Action," must be submitted in writing to the appropriate District Administrator, who will consult with the Regional Administrator.

##### C. **Right-to-Sue Requests at Intake:**

- 1) When the complainant requests a right-to-sue notice after the intake interview, and the complaint is one which otherwise would have been accepted for investigation, the Consultant will draft the complaint, have the complainant sign a DFEH-600-09A or DFEH-600-09B, and close the case with Closing Category 06, "Complainant Elected Court Action."
- 2) When the complainant requests a right-to-sue notice after the intake interview, and the complaint is one which would not have been accepted for investigation, the Consultant will complete a DFEH-300-04 and close the case with Closing Category 40, "An Administrative Decision." (Refer to Directive 228, "Complaints Where One or More of the Allegations or Parties are Rejected for Investigation.")

**D. Right-to-Sue Requests After A Complaint Has Been Filed:**

- 1) When a right-to-sue notice has not been issued prior to closure, the closure letter will contain the right-to-sue language.
- 2) A complainant requesting a right-to-sue notice after an employment complaint is served but prior to the 150 day notification, will be sent a pre-closure letter (DFEH-200-15) along with a "Request For Authorization To File A Lawsuit" (DFEH-600-09A or DFEH-600-09B). The complaint will remain open until the complainant has signed and returned the appropriate DFEH-600-09.
- 3) A complainant requesting a right-to-sue notice after receiving the 150 day notification will be sent a pre-closure letter (DFEH-200-23) along with a "Request For Authorization To File A Lawsuit" (DFEH-600-09A or DFEH-600-09B). The complaint will remain open until the complainant has signed and returned the appropriate DFEH-600-09.

**E. Right-to-Sue Notices Once A Merit Decision is Made:**

Under normal circumstances, complainants will not be allowed to elect court action after a non-merit decision has been made on a case. Where a closing report has been approved and a 14-day letter sent, unless the complainant raises compelling issues requiring further investigation, the case will be closed based on a finding of insufficient evidence. District Administrators, with the concurrence of the appropriate Regional Administrator, may waive this requirement in rare circumstances where such would be appropriate.

**F. Amending a Case Once It Has Been Closed:**

In those rare situations where a complainant or complainant's attorney wishes to amend a case which was closed on the basis of "Complainant Elected Court Action," the case **will not be reopened**. Rather, the case will be amended and processed as outlined in Directive 208, "Amending Complaints."

**5. APPROVAL:**

Nancy C. Gutierrez, Director

Date